UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

NAVOPACHE ELECTRIC COOPERATIVE, INC.

and **Case No. 28-CA-160585**

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 387, AFL-CIO-CLC

CHARGING PARTY'S ANSWERING BRIEF TO RESPONDENT'S STATEMENT OF EXCEPTIONS AND SUPPORTING BRIEF

WARD, KEENAN & BARRETT, P.C.
Gerald Barrett
2141 East Camelback Road, Suite 100
Phoenix, AZ 85016
Gbarrett@wardkeenanbarrett.com

Attorney for Charging Party IBEW Local 387

TABLE OF CONTENTS

TABLE OF CASES

U.S. Supreme Court

Circuit Court of Appeals

National Labor Relations Board

A. The Case

Upon learning that Respondent Navopache Electric Cooperative, (the "Respondent" or "Employer") had for several years maintained a written work rule precluding employees from communicating with members of its Board of Directors, individually or collectively, over "personnel matters", the Charging Party, International Brotherhood of Electrical Workers Local Union No. 387, (the "Union") filed an unfair labor practice charge. Counsel for the General Counsel issued a complaint. After conducting a hearing, Administrative Law Judge Dickie Montemayor ("ALJ") found the Employer had violated Section 8(a)(1) of the Act by maintaining the rule. The Employer timely filed exceptions.

B. Summary of the Union's Position

The central question in this case is whether Respondent's work rule frustrates employee exercise of Section 7 rights. It does. The fundamental Section 7 right at stake in this case is the right of employees to address corporate officials – the real decision makers – on terms and conditions of employment other matters affecting working conditions.

The law is well-settled. A work rule violates Section 8(a)(1) Act if it either explicitly restricts Section 7 activity or it can be reasonably interpreted by employees as restricting Section 7 activity. *Lutheran Heritage Village – Lavonia*, 343 NLRB 646, 647 (2004). Decisive here, a work rule prohibiting employees from addressing terms and conditions of employment with their employer's leadership violates the Act. *Hyundai America Shipping Agency*, 357 NLRB 860, 871 (2011); *American Federation*

of Teachers New Mexico, 360 NLRB No. 59 (2014); *Michigan State Employees Association*, 364 NLRB No. 65 (2016). When relevant, the question of employee interpretation does not provide a loophole for immunizing strategic or imprecise draftsmanship. Instead, any ambiguity as to the meaning or scope of a work rule is construed in favor of protecting free exercise of Section 7 rights. *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992).

Given this precedent, the facts allow no conclusion other than the instant work rule violates the Act. By stating employees "do not have access to the Board of Directors at regular or special meetings of the Board on personnel matters", the Rule explicitly restricts Section 7 activity." ALJD, pg. 4, L 22 – 30. Respondent's employees lack any other meaningful opportunity to address the Board with concerns over personnel matters outside of the Board's regular and special meetings. Given that fact and the breadth of the rule, the ALJ correctly concluded the rule could be reasonably interpreted as prohibiting all employee communication on personnel matters with the Board. ALJD, pg. 4, L 34 – 47. Likewise, the ALJ rejected Respondent's claim that the rule was justified based on Respondent's claimed business interests. ALJD, pg. 5, L 6 -21. Respondent's argument that *Lutheran Heritage Village* does not apply because the Union brought this charge in order to set the stage to circumvent Respondent's chosen bargaining representative, albeit quite imaginative, cannot be reconciled with *Hyundai America Shipping Agency, supra*, and in any event is pure speculation as to the future.

Secondary arguments made by Respondent are equally flawed. Deferral would have been inappropriate for, among other reasons, the Respondent unilaterally implemented the Rule outside of the collective bargaining process and the rule applies to all employees including those outside of the bargaining unit.

The Employer's final argument that Order will allow the Union and employees to dictate the Board of Director's meeting agenda is patently flawed hyperbole. The recommended Order is consistent with controlling precedent. As the ALJ noted, Respondent can effectively mitigate any potential collateral impact on any legitimate concern over business efficiency by drafting a narrowly tailored replacement rule. ALJD, pg. 5, L 6 – 21.

C. Relevant Facts

1. The Work Rule: Policy E5-270

Respondent's Policy E5-270, GCX2[1], provides as follows:

> PURPOSE
>
> To define personnel/Board relationship.
>
> PROVISIONS
>
> 1. The Board of Directors employs the General Manager. The General Manager is expected to be present at Board meetings. Department Managers or employees presenting reports, etc., at Board meetings do so at the direction and call of the General Manager.

[1] Reference to General Counsel Exhibits and Respondent's Exhibits shall be to "GCX" and "RX" respectively. Reference to the reporter's transcript shall be to "T" followed by an appropriate page number.

2. All employees are to understand that they, ultimately, report to the General Manager and do not have access to the Board of Directors at regular or special meetings of the Board on personnel matters.

3. Most employees are members of NEC. Should there be issues as a member, not related to personnel matters, then employees have the same access to visit with the Board of Directors as any member of NEC.

RESPONSIBILITY

General Manager and Department Managers.

2. The Respondent.

Respondent Navopache is a member-owned electric cooperative which provides electrical services to a large area of eastern Arizona and western New Mexico. T 22. Respondent employs approximately 100 employees. T 34, 25. Approximately 65 employees are employed in classifications covered by the parties' collective bargaining agreement. *Ibid.* The remaining approximate 35 employees are not represented. *Id.*

Respondent's headquarters is located in Lakeside, Arizona. T 22. Employees also work in distant sites in Heber-Overgaard, White River, Saint Johns and Springerville, Arizona and Reserve, New Mexico. *Id.*

Respondent, as a cooperative, is owned by its members (Cooperative Members), that is, individuals and businesses who secure electrical service from NEC. About 95% of the employees are Cooperative Members. T35-36, GCX 2.

3. Respondent's Board of Directors Responsibility Is All Encompassing and Includes "Personnel Matter."

Cooperative Members elect a Board of Directors which is responsible for overseeing operations. T 47-48. The Board employs various department managers to carry out day-to-day functions. As to labor and employment issues, the Board relies on the Chief Executive Officer to manage day-to-day matters. RX 2; T 68.

The Board meets monthly to conduct its regular business. It deals with broad ranging economic and managerial issues including the budget, purchases of power, overseeing business operations and overseeing appointed department managers. T 102. From time to time, the Board will meet in committee or at a special meeting to deal with a particular subject. T 99. Once a quarter, department managers present reports to the Board dealing with issues related to their respective departments. T 50-51; See, Policy E5-270, Subparagraph 1, GCX 2.

The Board's broad managerial responsibility includes personnel matters. During collective bargaining negotiations, the Human Resource manager, a member of Respondent's negotiating committee, updates the Board on the progress of negotiations, the proposals being made as well as "contract language, processes or procedures they'd like to change, the budget and the costs for various benefits." Board members have input as to their suggestions for changes to the collective bargaining agreement. T 50-51. Once negotiations are concluded, Board approval is required before the collective bargaining agreement becomes effective. T 52.

4. Respondent's Policy E5-270 Expressly Precludes Employees From Addressing "Personnel Issues" During Board Meetings.

The Board's meetings are open to all Cooperative Members. T 36. The regular monthly Board meetings last the entire business day. T 41. At each regular meeting, Cooperative Members are permitted to address the Board during a "call to members." During that time, the Cooperative Members may address the Board on the entire range of issues related to operations *except as restricted by Policy E5-270.*

Under Policy E5-270, employees who are Cooperative Members may not raise any "personnel matter". Subparagraph 2 provides "All employees are to understand that they, ultimately, report to the General Manager and do not have access to the Board of Directors at regular or special meetings of the Board on personnel matters. Subparagraph 3 provides that employees could "visit with" the Board of Directors on issues "not related to personnel matters." GCX 2.

The Respondent unilaterally implemented and maintains Policy E5-270. The Union first learned of Policy E5-270 during an arbitration hearing in an unrelated case. In that case, Respondent's Chief Executive Officer Chuck Moore disclosed Respondent maintained Policy E5-270, a policy which prohibits employees from communicating with members of the Board of Directors with respect to "personnel matters." During his testimony at the arbitration hearing, CEO Moore explained the objective and workings of the policy "If the employees have issues related to a member issue, they can work with the Board directly or discuss their matters as a member, but any personnel issues are to be directed through management." T 110.

As to the specific meaning and scope of the meaning Policy E5-270's third subparagraph, CEO Moore in the prior arbitration case testified that employees who were Cooperative Members could discuss issues related to power outages, rates or other matters related to Respondent's operations, but as to "any personnel matters, they do not have access to the Board to discuss personnel matters." T 118.

At no time during the arbitration hearing did CEO Moore testify that employees had "unfettered access" to Board members at times other than formal Board meetings. T 118-119.

The text of Policy E5-270 appeared in employee handbooks which were distributed to all of the employees. T 21. Human Resources Manager Stobs admitted that Respondent never communicated to employees that they could speak with members of the Board of Directors about "personnel matters" outside formal Board meetings. T 54-57. Respondent did not submit into evidence any other documents defining or otherwise limiting the scope of the term "personnel matter" from its broad commonly understood meaning.

5. Employees Lack a Meaningful Opportunity to Address "Personnel Matters" to Board Members Outside of the Board's Regular Meetings.

The record lacks any evidence reflecting employees have a meaningful opportunity to address Board Members, either individually or as a body in their official capacity in a business setting, unless at the Board's regular monthly meetings. Such void, however, plainly was not the result of Respondent's oversight at ULP hearing or a

failure to recognize such evidence was a critical predicate to its defense of Policy E5-270. The Respondent zealously tried, but failed.

The Respondent offered testimony of the *potential* for employees to address individual members at Respondent's facilities. Respondent referenced time, before and after the Board's regular meetings as well as breaks during regular meetings. T 54, 72 - 75. In addition to such limited fringe time, Respondent also offered evidence suggesting other happenstance encounters might occur in the parking lot, hallways, office kitchens and restroom facilities. T 53, 54, 72 - 75, 83 and 84.

The Respondent also offered evidence of potential off-site contact between employees and Board members. On this topic, however, Respondent offered nothing more than a fanciful description of small-town human social dynamics illustrated by a couple of anecdotal reports. Respondent's Brief in Support of Statement of Exceptions, pg. 8, 9. (Respondent's Brief). Respondent noted employees might find an opportunity to address Board members at annual company picnics and holiday parties. It does appear true that *one time*, an employee was unhappy about his work uniform, and he approached and 'unloaded' on the President of the Board at a local restaurant. *Id;* Respondent's Brief pages 8 -9. Nothing else of substance appears in the record.

D. Legal Argument

1. Respondent's Policy E5-270 Cannot Be Reconciled With Board Precedent Protecting the Right of Employees to Address Corporate Officials.

Board work rule cases, as applicable here, simply follow the long-standing principal that Section 7 grants to employees the right of employees to choose to whom

they will address concerns on terms and conditions of employment includes corporate officials – the real decision makers. *Hyundai America Shipping Agency*, 357 NLRB 860, 871 (2011); *American Federation of Teachers New Mexico*, 360 NLRB No. 59, 2014 NLRB LEXIS 155, *1 (2014)(Finding unlawful rule that prohibited "AFTNM employees from engaging in internal politics of AFT-NM, its locals, or AFT, including lobbying executive council members on items likely to come before them, including personnel matters"); *Michigan State Employees Association*, 364 NLRB No. 65, 2016 NLRB LEXIS 570, *9-10 (2016)(Directive unlawful as it plainly conveyed the message that employee concerns were to be discussed with only a single member of management.)

Respondent's efforts to thread a needle to distinguish these recently decided work rule cases is unpersuasive. Respondent's Brief pages 21 – 23. Its reliance on the decision of the D.C. Circuit in *Hyundai American* to not enforce the portion of the Board's Order that a work rule violated Section 8(a)(1) is misplaced. The D.C. Circuit did not enforce that portion of the Board's order based on the distinction, plainly not applicable here, that:

> [T]the handbook urges employees to voice their complaints to their supervisors or to Human Resources, but the language is neither mandatory nor preclusive of alternatives . . . " A reasonable employee would not read the provision, with its exhortatory language and lack of penalties, to prohibit complaints protected by § 7.

Hyundai Am. Shipping Agency, Inc. v. NLRB, 805 F.3d 309, 316, (D.C. Cir. 2015)(Emphasis supplied). In sharp contrast, Policy E5-270 is not mere "exhortatory"

language. Instead, it *expressly precludes* employees from addressing concerns to Board members.

Respondent's further attempt to justify Policy E5-270 by arguing the Policy does limit employees to directing concerns to a single person likewise is at odds with the above cited work rule cases. In *Michigan State Employees Association*, the Board referenced that fact as an aggravating factor. But, it hardly was decisive. Allowing employees to address concerns to multiple underlings, but expressly precluding employees from addressing an employer's governing body, as demonstrated by *American Federation of Teachers* violates the Act.

That the Act grants employees the right to address concerns with their employer's governing board also is demonstrated by cases arising outside the context of work rules. The Act prohibits an employer from precluding employee's access to decision makers by creating a "chain of command." *ILD Corp.*, 2001, NLRB, Lexis 249 *94 (2001)("Long recognized statutory protection would be eliminated by permitting employers to validly advance an abstract 'chain of command' argument to defeat efforts to seek protection from a higher supervisory level. . . ")

Moreover, the Board and the courts have consistently held that work related protests and other actions directed at supervisory or managerial employees are protected by Section 7. For example, complaints to corporate officials over dissatisfaction with a supervisor are protected. *Atlantic-Pacific Construction Company, Inc.* 52 F.3d 260,262-263 (9th Cir. 1995); *Senior Citizens Coordinating Council of Riverbay Community, Inc.*, 330 NLRB 1100, 1103 (2000) (employees' concerted attempts to influence selection of

supervisors and managers are protected where the employees' terms and conditions of employment are directly affected).

Specifically, protests over working conditions aimed at boards of directors are protected Section 7 activity. For example, in *McKesson, Corp.,* 2014 NLRB, Lexis 851, *95-109 (2014), an employee was disciplined for engaging in activity which included attending an annual shareholder meeting and questioning the chief executive officer about issues related to stalled collective bargaining negotiations. The judge concluded that the employees' activities at the shareholder meeting were protected under Section 7 and the disciplinary action was unlawful. In *Englehart Corp.,* 342 NLRB 46, 48, 51(2004), the Board concluded that employees had a Section 7 right to picket an annual shareholders meeting to protest a delay in collective bargaining negotiations. See also *Walmart Stores, Inc.*, 2016 NLRB, Lexis 147 *143-148 (2016). (Picketing at company headquarters during financial analyst meetings was protected under Section 7.)

Thus, the employees have a Section 7 right to communicate with whom they choose about terms and conditions of employment. Here, Policy E5-270 expressly precludes employees from communication over "personnel matters" with Board members, both individually and as a body, with Board members.

2. Respondent's Attempt to Defend Policy E5-270 Based on the Fact that it Concerns the Board's Working Time is Frivolous.

Respondent first presents: A. Whether the Policy on its face violates Section 8(a)(1) of the Act notwithstanding the limit of its applicability to the Board's working time. (Statement of Exceptions Nos. 1 -10); Respondent's Brief, page 1.

Respondent's argument rests on *Peyton Packing Co, Inc.*, 49 NLRB 828, 843 (1943) which, of course, allows an employer to implement rules designed to assure that employees are working during their assigned working hours. Respondent's Brief, pages 14 – 19. This is not the time to comment on the wisdom and scope of *Peyton Packing* and its progeny. But, plainly the categorical rule in *Peyton Packing* that an employer may restrict employees from exercising certain Section 7 rights during *their work time* is irrelevant. First, there is no evidence that any employee attending Board meetings would be doing so during "working time." Second, and more importantly, if an employer could implement a rule proscribing employees from addressing management based on whether management is working, there would be nothing left to Section 7. Management would always be working!

Putting aside the strained reference to *Peyton Packing*, Respondent more rationally - but *not* any more persuasively – argument suggests E5-270 is necessary for the Board to effectively and efficiently conduct its business. Respondent's Brief, pages 14 – 22. This "balancing of interests" argument squares neither with the facts or Board precedent.

If Board law permitted a balancing of interests, certainly protection of Section 7 rights would be a critical part of the calculus. Here, absent being able to attend Board meetings, employees have no meaningful opportunity to meet with Board members, individually or as a body, to discuss personnel issues. See, Part C, Relevant Facts, Section 5. In short, Respondent's suggestion that happenstance encounters in hallways, restrooms, picnics and local diners reflects a rather dismissive view of the significance of Section 7 rights. Employees are entitled to act in concert, at a time and in a forum suitable for serious discussion.

In any event, the ALJ correctly noted that Board precedent rejects the suggested "balancing of interests" approach. Decision, page 5, L 6 – 21; *William Beaumont Hospital*, 363 NLRB No. 162 (2016); *Northeastern Land Services, Ltd.*, 645 F. 3d 475, 483 (1st Cir. 2011); *Cintas Corp. v. NLRB*, 482 F. 3d 463, 470 (D.C. Cir 2007). Respondent remains free to draft a more tailored rule.

3. The The ALJ Properly Concluded Employees Could Reasonably Conclude Policy E5-270 as Restricting Exercise of Section 7 Activities Outside of Board Meetings.

Respondent next presents: B. Whether employees reasonably construe the Policy to restrict Section 7 activities outside of the Board's regular and special meetings? (Statement of Exceptions Nos. 11 – 18); Respondent's Brief page 1.

To the extent the question of employee potential interpretation is relevant – and it is not given the explicit prohibition on communication at Board meetings – the answer to Respondent's question is "yes". *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998); *Lutheran Heritage Village – Lavonia*, 343 NLRB 646, 647 (2004). See,

Cintas, Corp. v. NLRB, 482 F.3d 463, 467 (2007)(In making its determination, the Board focuses on the text of the challenged rule. As long as its textual analysis is reasonably defensible, and adequately explained, the Board need not rely on evidence of employee interpretation consistent with its own determination that a company rule violates Section 8 of the Act.)

The ALJ correctly concluded Subparagraph 3 of Policy E5-270 further extends the prohibition not only to Board meetings, but to every occasion on which an employee would attempt to "visit with" Board members to discuss working conditions.

The record does not support the Respondent's contention that no reasonable employee could construe Policy E5-270 extending beyond Board meetings. When asked prior to the filing of the instant charge to explain the meaning of the third subparagraph, CEO Moore testified that employees who were Cooperative Members could discuss issues related to power outages, rates or other matters related to the operations, but that "any personnel matters, they do not have access to the Board to discuss personnel matters." T 118.

Without question, Respondent never made any effort to define the now claimed limits of the policy to Board meetings. Human Resources Manager Stobs admitted that Respondent never communicated to employees that they could speak with members of the Board of Directors about "personnel matters" outside formal Board meetings. T54-57. See, *Michigan State Employees* Association, *suora.,* 2016 NLRB LEXIS 570, *9 ([B]ecause the directive does not define "employee concerns," employees would reasonably construe the rule to prohibit their discussion of terms and conditions of

employment.) The lack of definition is particularly significant given the wide breadth of appropriate Section 7 protected communication to corporate officials. *Eastex, Inc.* 437 U.S. 556, 567 (1978).

In short, a work rule that places an employee at his peril for deciding whether a particular issue can be construed by management as a "personnel issue" is irreconcilable with the free exercise of Section 7 rights.

4. Deferral was Not Appropriate

Next the Respondent questions: C. Whether the instant dispute should be deferred to the grievance and arbitration provisions of the parties' Collective Bargaining Agreement. (Statement of Exceptions Nos. 19-31).

Substantial and longstanding Board precedent stands for the proposition that deferral is not appropriate where the primary issue to be resolved is one of statutory interpretation. That is particularly true where, as here, the policy extends beyond the collective bargaining agreement to approximately one third of the work force which is not covered by the collective bargaining agreement. *Marriott International, Inc.*, 389 NLRB 144, 151-152 (2012), *North American Pipe Corp.*, 347 NLRB 836, 852-53 (2006); *Pioneer Press,* 297 NLRB 977, 995 n.2 (1990), *Heck's, Inc.*, 293 NLRB 1111, 1116 (1989).

Nor can Respondent establish that the Union clearly and unequivocally waived the rights of employees to challenge NEC on issues of statutory interpretation. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 709 (1983)(Any waiver by a union of the statutory rights of represented employees must be "clear and unmistakable. ") The

policy was not negotiated, the grievance arbitration provision of the collective bargaining agreement does not mention the policy and there is nothing in the agreement which explicitly waives the rights of employees to file charges to secure rights protected under the Act.

5. Respondent's Attempt to Defend Policy E5-270 Based on its Right to Determine Its Bargaining Representative is Frivolous.

Next the Respondent questions: D. Whether Charging Party's allegations are an attempt to circumvent the Cooperative's designated bargaining representative in violation of Section 8(b)(1)(B) of the Act? (Statement of Exceptions Nos. 32-39).

As urged above, the Act protects the right of employees to address concerns to their employer's board of directors. Indeed, employees have the right to voice concerns to their employer's board of directors even during the course of collective bargaining. *McKesson, Corp.,* 2014 NLRB, Lexis 851, *95-109 (2014); *Englehart Corp.,* 342 NLRB 46, 48, 51(2004). By promulgating a work rule that expressly precluded employees from free exercise of that right, Respondent violated Section 8(a)(1).

If Respondent ever believes that facts and circumstances reflect that the Union is attempting to "circumvent [Respondent's] selected bargaining representative, it will have the ability to file a Section 8(b)(1)(b) charge. However, Respondent's current speculation is irrelevant to the issue at hand, namely, Policy E5-270.

6. The ALJ's Recommended Remedy Advances the Policies and Purposes of the Act. Reasonable Employee

Finally, Respondent questions: E. Whether the ALJ's recommended remedy advances the purposes and policies of the Act. (Statement of Exceptions Nos. 40-45).

Respondent fails to urge that the ALJ's recommended is inconsistent with existing precedent. Rather, its argument tends more to the proposition that Board adoption of the recommended order will bring an end to civilization as we know it, or at least, the detriment of all. Respondent's Brief page 28.

Such hyperbole is far-fetched. If it has legitimate concerns, Respondent has the ability to draft a narrowly tailored rule. *William Beaumont Hospital*, 363 NLRB No. 162 (2016); *Cintas Corp. v. NLRB*, 482 F. 3d 463, 470 (D.C. Cir 2007).

E. Conclusion

The ALJ's Decision is consistent with Board precedent. Respondent offers no basis for distinguishing such authority. Respondents' suggestion that its policy precluding employees from attending Board meetings can be justified because employees may have an opportunity to "talk with directors when they take lunch, breaks, in the hallways, kitchen and parking lot, or when they pass each other in their neighborhoods" would render illusory a significant Section 7 right. Respondent's Brief page 21.

The Union respectfully requests that the Board adopt the ALJ's Decision and Recommended Order.

Submitted the 3rd day of April 2017.

WARD, KEENAN & BARRETT, P.C.
By: s/Gerald Barrett
Gerald Barrett
2141 East Camelback Road, Suite 100
Phoenix, AZ 85016
Gbarrett@wardkeenanbarrett.com
Attorney for Charging Party IBEW Local 387

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2017, a true and correct copy of the foregoing Notice Answering Brief was sent in the manner indicated below to the following:

VIA E-FILING

Office of the Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570

VIA FIRST CLASS MAIL

Administrative Law Judge Dickie Montemayor
National Labor Relations Board
901 Market Street, Suite 300 San
Francisco, CA 94103-1779

Cornele A. Overstreet
Regional Director
National Labor Relations Board
Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004

VIA EMAIL

John Alan Doran
Sherman & Howard L.L.C.
7033 East Greenway Parkway, Suite 250
Scottsdale, AZ 85254
Email: jdoran@shermanhoward.com

Patrick Scully
Sherman & Howard, L.L.C.
633 17th Street, Suite 3000
Denver, CO 80202
Email: pscully@shermanhoward.com
Attorneys for Respondent

Stefanie J. Parker
Counsel for the General Counsel
National Labor Relations Board, Region 28
2600 N Central Ave #1400,
Phoenix, AZ 85004
Email:Stefanie.Parker@nlrb.gov

s/ Mary Farley